

**Case No. D10/05**

**Profits tax** – real property – whether acquired as capital asset or trading asset – badges of trade – whether expenses should be allowed – sections 16(2), 17(2)(b) and 68(4) of the Inland Revenue Ordinance ('IRO').

Panel: Ronny Wong Fook Hum SC (chairman), Arthur Chan Ka Pui and David Yip Sai On.

Dates of hearing: 16, 17 August and 20 December 2004.

Date of decision: 29 April 2005.

The appellant was a carpenter. He became a partner in a real estate agency business in May 1989. By an agreement dated 1 June 1997, the appellant agreed to sell to Mr AJ and Mr AK the 1<sup>st</sup> and 2<sup>nd</sup> Floors of the house to be erected on the Subject Lot for \$3,510,000. By an agreement dated May 1997, Mr X agreed with the appellant to erect a three storeys house on the Subject Lot for \$1,100,000.

**Held:**

1. The appellant was no stranger to the property market. He was a partner in a real estate agency between 1989 and 1993. He bought and sold flats in regular intervals. Given the short periods of ownership, it is not convincing to assert that those dealings were in the course of locating a suitable home. There was no cogent evidence that the appellant was in a financial position to hold the redevelopment on the Subject Lots on a long term basis. Taking a global view of all the circumstances of this case, the Board is not satisfied that the appellant has discharged his onus of proof. The Board therefore holds against the appellant on the issue whether he is liable to profits tax on the disposal of the subject units.
2. The appellant's appeal, save and in so far as it relates to the issues of construction costs and commission, is therefore dismissed.

**Appeal dismissed.**

Cases referred to:

(2005-06) VOLUME 20 INLAND REVENUE BOARD OF REVIEW DECISIONS

Simmons v IRC (1980) 53 TC 461  
All Best Wishes Ltd v CIR (1992) 3 HKTC 750  
Marson v Morton [1986] 1 WLR 1343

Lui Siu Tang of Messrs Lui Siu Tang & Company for the taxpayer.  
Leung Wing Chi and Poon So Chi for the Commissioner of Inland Revenue.

**Decision:**

**Background**

1. The Appellant was a carpenter. He took up that career in 1975.
2. Commencing from 1 May 1989, the Appellant became a partner with Madam A in a real estate agency business by the name of Agency Company B. Agency Company B ceased business on 13 October 1993.
3. The Appellant and Madam A began living together in 1990. Madam A had by then three children from her first marriage born respectively in 1980, 1982 and 1983.
4. By an assignment dated 14 December 1990, the Appellant and Madam A acquired as joint tenants the Flat C for \$566,000. They sold the Flat C on 12 April 1991 for \$670,000. The Flat C is of an area of about 394 square feet. By letter dated 28 December 1994, the Appellant informed the Revenue that he disposed of this flat because it was too small.
5. By an assignment dated 23 June 1991, the Appellant, Madam A and Mr D purchased as joint tenants the Flat E for \$1,225,000. They sold the Flat E on 15 April 1992 for \$1,890,000. The Flat E is of an area of about 599 square feet.
6. On 15 January 1992, Madam A, Mr F and Mr G as joint tenants purchased the Ground, the 1<sup>st</sup> and the 2<sup>nd</sup> Floors of the premises erected on Address H for \$2,750,000. They resold the 2<sup>nd</sup> Floor on 25 March 1992 for \$1,400,000; the 1<sup>st</sup> Floor on 9 June 1992 for \$1,160,000 and the Ground floor on 13 August 1992 for \$1,280,000.
7. On 16 June 1992, the Appellant and Madam A as joint tenants purchased the Flat I for \$2,280,400. The Flat I is of an area of about 709 square feet.
8. By an agreement dated 12 August 1992, the Appellant purchased the 2<sup>nd</sup> Floor and the Main Roof of Address J [‘the Lot K Flat’] for \$1,150,000. He resold the Lot K Flat on 1 September 1992 for \$1,350,000. The Lot K Flat is of an area of about 550 square feet. By letter

(2005-06) VOLUME 20 INLAND REVENUE BOARD OF REVIEW DECISIONS

dated 28 December 1994, the Appellant informed the Revenue that he sold the Lot K Flat because it was too small.

9. By an assignment dated 8 September 1992, Madam A and Madam L purchased Lot M for \$430,000.

- (a) By a Division Plan dated 25 September 1992, Lot M was sub-divided into two parts:
  - (i) Section A [‘Section A of Lot M’] with an area of 988 square feet.
  - (ii) The Remaining Portion [‘the Remaining Portion of Lot M’] with an area of 1,190 square feet.
- (b) By an assignment dated 26 October 1992, one Mr N ostensibly purchased Section A of Lot M for \$100,000. By a loan agreement dated 26 October 1992, Madam A agreed to make advances with interest at 15% p.a. to Mr N to acquire Section A of Lot M; to erect a village house thereon and to pay the premium in order to facilitate sale of the completed units. The benefit to be retained by Mr N from the completed village house was fixed at \$180,000.
- (c) By an assignment dated 26 October 1992, one Mr O ostensibly purchased the Remaining Portion of Lot M for \$100,000. By a loan agreement also dated 26 October 1992, Madam A agreed to make advances with interest at 15% p.a. to Mr O to acquire the Remaining Portion of Lot M; to erect a village house thereon and to pay the premium in order to facilitate sale of the completed units. The benefit to be retained by Mr O from the completed village house was also fixed at \$180,000.
- (d) On 29 October 1992, each of Mr N and Mr O applied to the District Lands Office, District P for a building licence to erect a village house on respectively Section A and the Remaining Portion of Lot M.
- (e) On 30 October 1992, Mr O allegedly engaged Madam A as his consultant for the construction of a village house on the Remaining Portion of Lot M for a consideration of \$200,000.

10. By an agreement dated 24 September 1992, the Appellant purchased the 2<sup>nd</sup> Floor and the Main Roof of the premises erected on Address Q [‘the Lot R Flat’] for \$770,000. He sold the Lot R Flat on 24 December 1992 for \$1,150,000.

(2005-06) VOLUME 20 INLAND REVENUE BOARD OF REVIEW DECISIONS

11. On 19 January 1993, the Appellant acquired Lot S. Lot S was also divided into two parts:

- (a) Section A of Lot S. The Appellant transferred this portion in favour of Mr T by an assignment dated 2 November 1993.
- (b) The Remaining Portion of Lot S ['the Subject Lot'].

12. On 2 November 1993, the Appellant entered into an agreement ['the Ding Agreement'] with Mr U. Mr U is an indigenous villager of the Village V in District P with right to erect a village house therein. By the Ding Agreement, Mr U agreed to apply in his name to erect a village house on land provided by the Appellant. In return therefor, the Appellant agreed to pay Mr U \$180,000. On the same day, the Appellant transferred the Subject Lot to Mr U who proceeded to apply for a building licence from the District Lands Office, District P. The Appellant claims that Mr U was a Ding introduced by Madam L. Madam L was allegedly paid \$60,000 for her service. Madam L acknowledged payment by a receipt dated 13 January 1993.

13. The Appellant married Madam A on 8 June 1994. Madam A gave birth to their son on 29 November 1994.

14. In his return for 1994/95 dated 13 June 1995, the Appellant informed the Revenue that he had no income since 12 October 1993. He anticipated sale of the Flat I on 15 August 1995 as he did not have any income to meet the mortgage repayments. The appellant further indicated that the proceeds from sale of the Flat I would be used for his future living expenses.

15. On 8 June 1995, certificates of exemption were granted in favour of Mr N and Mr O in respect of their applications for village houses to be erected on Section A and the Remaining Portion of Lot M.

- (a) By an agreement dated 15 June 1995 ['the Supervision Agreement'], Madam A engaged the Appellant to supervise the construction in the Remaining Portion of Lot M at a salary of \$18,000 per month.
- (b) By an agreement dated 1 July 1995, Mr N agreed to borrow from Madam A \$1,000,000 for the development of Section A of Lot M. He further authorised Madam A to overlook the construction and sale of the units on that site. Madam A was to recoup from the sale proceeds the amount advanced together with \$150,000.
- (c) On 20 July 1995, Building Contractor W submitted a quotation to Madam A for building works on Section A of Lot M.

(2005-06) VOLUME 20 INLAND REVENUE BOARD OF REVIEW DECISIONS

- (d) On 30 July 1995, Building Contractor W submitted a quotation to Madam A for building works on the Remaining Portion of Lot M.
- (e) Various receipts were placed before us whereby Building Contractor W acknowledged payments in 1995 and 1996 from Madam A.
- (f) On 2 October 1995, Madam A and Mr O entered into an agreement whereby Mr O agreed to provide his right as an indigenous villager for a consideration of \$180,000.
- (g) By an agreement dated 25 October 1995 between Mr X and Madam A, Mr X of Company Y agreed to alter the superstructure on the Remaining Portion of Lot M for a consideration of \$730,000. Commencing from about 26 December 1995, Company Y issued receipts for payments from Madam A for construction works in the Remaining Portion of Lot M.
- (h) By an agreement dated 10 May 1996, Madam A sold to Mr Z the 2<sup>nd</sup> Floor and the Roof of the house on Section A of Lot M for \$1,280,000.
- (i) By letters dated 3 June 1996, Mr N and Mr O informed the District Lands Office, District P of completion of building works on Section A and the Remaining Portion of Lot M. They invited representatives from the District Lands Office to inspect the site with the view of issuing a certificate of compliance.
- (j) By an agreement dated 19 June 1996, Madam A sold to Mr AA the Ground Floor of the house on Section A of Lot M for \$1,100,000.
- (k) By an agreement dated 18 March 1997, Madam A sold the 1<sup>st</sup> Floor of the house on Section A of Lot M for \$1,400,000.
- (l) By an agreement dated 29 March 1997, Madam A sold the 1<sup>st</sup> Floor of the house on the Remaining Portion of Lot M for \$1,728,000.

16. Throughout the course of 1995 and 1996, Madam A entered into loan agreements with various persons in order to raise funds to support the development in the Remaining Portion of Lot M. Her lenders included Madam AB, Mr AC, Madam AD and Mr AE.

17. By a provisional agreement dated 29 May 1995, the Appellant and Madam A sold the Flat I for \$2,780,000. The sale was completed on 15 August 1995. The consideration depicted in the assignment was \$2,670,000. After repaying the mortgage secured over this flat, the net proceeds amounting to \$1,058,753.46 were deposited on 16 August 1995 into the joint

(2005-06) VOLUME 20 INLAND REVENUE BOARD OF REVIEW DECISIONS

account of the Appellant and Madam A with Bank AF. The last entry in the copy passbook of this account placed before us is 23 September 1995. We do not know the movement of this account after that date.

18. By a tenancy agreement dated 24 June 1995, the Appellant rented the Flat AG for a period of one year with rental at \$8,000 per month. Madam A paid the rent due under this tenancy. The monthly payments were set off against salary allegedly due in favour of the Appellant under the Supervision Agreement.

19. On 30 May 1996, the Appellant submitted his return for 1995/96. No income was declared in that return. The Appellant informed the Revenue that he failed to find suitable work since November 1993.

20. By a tenancy agreement dated 4 July 1996, the Appellant rented the Flat AH for a period of two years from 15 July 1996 with rental at \$9,300 per month.

21. By letter dated 23 October 1996, District Lands Office, District P informed Mr U of the grant of a building licence. The building licence was eventually issued on 28 January 1997. By letter dated 7 November 1996, Mr U applied to District Lands Office, District P for exemptions in respect of building works to be carried out on the Subject Lot.

22. It is the case of the Appellant that he entered into a written tenancy agreement dated 8 January 1997 [ 'the Alleged Tenancy' ] with Madam AI for the letting of the 1<sup>st</sup> Floor of the village house to be erected on the Subject Lot for two years from date of occupation with rental at \$4,000 per month. The Alleged Tenancy was however terminated by another written agreement dated 1 June 1997. A \$20,000 deposit allegedly paid by Madam AI was returned together with a sum of \$10,000 allegedly by way of compensation.

23. By an agreement dated 1 June 1997 [ 'the Sale Agreement' ], the Appellant agreed to sell to Mr AJ and Mr AK the 1<sup>st</sup> and 2<sup>nd</sup> Floors of the house to be erected on the Subject Lot for \$3,510,000. 10% of the price was payable on signing of this agreement. Another 10% was payable on completion of the roof. A further 10% was payable on issuance of the certificate of compliance. The balance of \$2,457,000 was payable upon notification of the premium payable for alienation of units in the Subject Lot. The Sale Agreement was witnessed by Estate Company AL. Clause (16) of this agreement provided that the Appellant would pay Estate Company AL commission of \$35,100.

- (a) The Appellant submitted to the Revenue a receipt no 0507 issued by Estate Company AL for \$53,300. The wordings on this receipt was altered in two respects. First, the date appears to have been amended from 30 May 1997 to 30 July 1997. Secondly, the subject matter appears to have been altered from the whole block to just the 1<sup>st</sup> and the 2<sup>nd</sup> Floors.

## (2005-06) VOLUME 20 INLAND REVENUE BOARD OF REVIEW DECISIONS

- (b) The Appellant submitted to the Revenue a further receipt no 277477 issued by Property Company AM for \$30,000 said to be commission in respect of the Subject Lot.

24. On 30 June 1997, Madam A allegedly reached agreement with Madam AB, Mr AC, Madam AD and Mr AE for extension of their subsisting loans so as to facilitate the construction of the house on the Subject Lot. Agreements were reached with the lenders that they would be repaid from proceeds of sale of the completed units in the Subject Lot.

25. By an agreement dated May 1997 between the Appellant and Mr X [‘the Construction Contract’], Mr X agreed to erect a three storeys house on the Subject Lot for \$1,100,000. Commencing from May 1997, the Appellant made payments in favour of Mr X said to be in respect of construction works on the Subject Site.

Date	Payments made			Receipts issued by Mr X	
	Amount	Mode of payment	Description	Amount	Description
29-5-1997				\$100,000 in cash	Being 3 <sup>rd</sup> instalment with a total of \$300,000 paid
7-7-1997	\$100,000	Cheque 74989	Being 3 <sup>rd</sup> instalment		
21-7-1997	\$100,000	Cheque 749897	Being 4 <sup>th</sup> instalment		
4-8-1997	\$100,000	Cheque 824167 drawn by the Appellant	Being 5 <sup>th</sup> instalment with a total of \$500,000 paid		
2-9-1997	\$100,000	Cheque 824176			
4-10-1997	\$100,000	Allegedly paid in cash			
6-11-1997	\$100,000	Cheque 824193 drawn by the Appellant	Being 7 <sup>th</sup> instalment with a total of \$700,000 paid		
10-12-1997	\$100,000	Cheque 824197 drawn by the Appellant	Being 8 <sup>th</sup> instalment with a total of		

(2005-06) VOLUME 20 INLAND REVENUE BOARD OF REVIEW DECISIONS

			\$800,000 paid		
14-1-1998	\$50,000	Cheque 790906 drawn by the Appellant	Total paid \$850,000		
24-8-1998	\$150,000	Cheque 782303			

The Appellant sought to rely on payments on 29 May 1997 (\$50,000), 1 June 1997 (\$50,000) and 13 June 1997 (\$100,000) in favour of Mr X. The Revenue was previously informed that those payments were in respect of works pertaining to Lot M.

26. By a tenancy agreement dated 28 May 1998, the Appellant renewed his tenancy over the Flat AH for a further term of two years from 15 July 1998.

27. The certificate of compliance in respect of the village house erected on the Subject Lot was granted on 23 June 1998. By letter dated 3 July 1998, Legal Firm AN enquired with District Lands Office, District P as to the amount of premium payable for removal of the restriction of alienation governing the Subject Lot. By letter dated 29 October 1998, District Lands Office, District P assessed the premium payable at \$811,000.

28. In about November 1998, Madam A started repaying her debtors. The sale by the Appellant of the 1<sup>st</sup> and 2<sup>nd</sup> Floors of the village house on the Subject Lot was completed on 18 December 1998.

29. By letter dated 1 February 1999, the Appellant gave notice terminating his tenancy in respect of the Flat AH. He moved into the Ground Floor of the village house erected on the Subject Lot in about April 1999. The Ground Floor is about 49.8 m<sup>2</sup> with two bedrooms, two bathrooms, a kitchen and a living room. The 1<sup>st</sup> Floor of that house is of an area of 56.3 m<sup>2</sup> with a bedroom, a bathroom, a kitchen and a living room. The 2<sup>nd</sup> Floor of that house is of an area of 56.3 m<sup>2</sup> with three bedrooms and two bathrooms.

30. By an assignment dated 3 February 2000, the Ground Floor of the village house on the Subject Lot was assigned in favour of the Appellant and Madam A. They borrowed \$380,000 from Bank AO on the strength of that unit. Various repayments were made to Madam AB in February and March 2000.

### **The issues**

31. There are two issues before us. The first issue is whether the Appellant is assessable to profits tax in respect of the gains he made from his disposal of the 1<sup>st</sup> and 2<sup>nd</sup> Floors of the village house on the Subject Lot. The second issue is the extent to which the Appellant should be permitted to deduct various items of expenditure from such assessable profits (if any).

**Oral testimony before us**

32. The Appellant, Madam A and Madam AI gave evidence before us.
33. According to the Appellant:
- (a) He studied up to primary 6.
  - (b) He has vague recollection that the Ding right was purchased well in advance which accounts for the payment of \$60,000 which Madam L acknowledged on 13 January 1993.
  - (c) He himself completed the returns for 1994/95 and 1995/96. He explained that he had little knowledge of the fiscal provisions.
  - (d) He cannot recall whether he ever received the payments which he acknowledged as allegedly due under the Supervision Agreement.
  - (e) His circumstances were changing all the time. At one point he planned to occupy all the units in the village house on the Subject Lot. He could not say why he decided to sell. He is totally confused on re-reading the materials.
  - (f) Madam A drafted the Construction Contract. He had known Mr X for over 10 years. He had to move his funds around in order to meet the construction costs.
  - (g) He took a two years renewal of the tenancy over the Flat AH as the development on the Subject Lot was still uncompleted and he had an oral understanding with the landlord for early termination.
  - (h) Both Estate Company AL and Property Company AM were involved in the sale of the 1<sup>st</sup> and 2<sup>nd</sup> Floors of the village house on the Subject Lot. He could not shed any light on the amendments to the receipt issued by Estate Company AL. He could not explain the discrepancy between the entitlement of Estate Company AL under the Sale Agreement (\$35,100) and the sum of \$53,300 as acknowledged by Estate Company AL in that altered receipt. He confirmed the explanation given by his tax representative in a letter dated 24 March 2004 whereby the tax representative asserted that Estate Company AL was responsible for persuading the Appellant to sell the relevant units and Property Company AM was responsible for locating the purchaser.

(2005-06) VOLUME 20 INLAND REVENUE BOARD OF REVIEW DECISIONS

34. According to the Madam A:

- (a) She became acquainted with a Ms AP in 1984. Ms AP resided in Village V. She took a liking of that village in 1989.
- (b) The Appellant became her partner in the real estate agency in the name of Agency Company B when her former partner left as a result of the 4 June incident. Agency Company B ceased business as she could not afford the increased rental demanded for its business premises.
- (c) She purchased the Flat C with the Appellant in 1990. Her mother was then assisting her in looking after her three children from the former marriage who were then residing in District AQ.
- (d) They purchased the Flat I with the aid of a mortgage. The monthly repayment was about \$17,000. The Appellant did not have much income in 1994/95. It was a burden to meet those monthly repayments.
- (e) She undertook the construction on the Remaining Portion of Lot M as Mr O did not have fund to support its development. She borrowed from others in order to fund her advances to Mr O.
- (f) She elected not to repay her creditors but had the loans extended in order to finance the Appellant's development of the Subject Lot.
- (g) The initial plan was to retain two storeys in the completed premises on the Subject Lot as her home. All her children and her mother would reside together.
- (h) She was present when the Alleged Tenancy was concluded with Madam AI. She knew Madam AI from her days as an estate agent. They were mere acquaintances and were not good friends. She met Madam AI by chance and learned that Madam AI was residing in a dilapidated village house with her daughter. It was therefore proposed that Madam AI should rent a unit in the completed development.

35. According to Madam AI:

- (a) She moved from District P to live in House XXXX in Village V in December 1996. It was a very small house of about 200 odd square feet. The rental was \$1,000 per month.

(2005-06) VOLUME 20 INLAND REVENUE BOARD OF REVIEW DECISIONS

- (b) She would go pass the Subject Lot when entering the Village V. When the Alleged Tenancy was signed, construction on the Subject Lot was more or less complete. She did not inspect any unit to see its layout.
- (c) She paid the deposit of \$20,000 as Madam A said she was in need of fund to construct the house.
- (d) The Alleged Tenancy was cancelled when Madam A told her that the units could be sold.
- (e) She is still residing in Village V.

**The applicable principles**

36. There is little dispute between the parties as to the applicable principles.

37. The intention of the Appellant at the time of acquisition of the Subject Lot is crucial in determining whether that he acquired the same as capital asset or trading asset. As stated by Lord Wilberforce in Simmons v IRC (1980) 53 TC 461

*‘Trading requires an intention to trade: normally the question to be asked is whether this intention existed at the time of the acquisition of the asset. Was it acquired with the intention of disposing of it at a profit, or was it acquired as a permanent investment?’.*

38. An intention to hold property as a capital investment must be definite. The stated intention of the taxpayer is not decisive. Actual intention can only be determined objectively. In All Best Wishes Ltd v CIR (1992) 3 HKTC 750 Mortimer J gave the following guidance:

*‘The intention of the taxpayer, at the time of acquisition, and at the time when he is holding the asset is undoubtedly of very great weight. And if the intention is on the evidence, genuinely held, realistic and realisable, and if all the circumstances show that at the time of the acquisition of the asset, the taxpayer was investing in it, then I agree. But as it is a question of fact, no single test can produce the answer. In particular the stated intention of the taxpayer cannot be decisive and the actual intention can only be determined upon the whole of the evidence ... It is trite to say that intention can only be judged by considering the whole of the surrounding circumstances, including things said and things done. Things said at the time, before and after, and things done at the time, before and after. Often it is rightly said that actions speak louder than words’.*

39. Under section 68(4) of the Inland Revenue Ordinance ('IRO'), the onus of proving the assessment appealed against is excessive or incorrect is on the Appellant.

### **Our decision**

40. The Appellant submitted that the relevant date is 2 November 1993. We think not. He acquired Lot S on 19 January 1993. We are of the view that this latter date is the relevant date. Little however turns on this disagreement.

41. The Appellant placed considerable reliance on the Alleged Tenancy as supportive of his investment intention in 1993. The Revenue challenged the authenticity of that document on the basis that it was not stamped. We are of the view that there are other and more fundamental objections to the Alleged Tenancy:

- (a) The Alleged Tenancy was said to have been concluded on 8 January 1997. This was well prior to the Construction Contract of May 1997.
- (b) Madam AI said that when the Alleged Tenancy was concluded, the development on the Subject Lot was in an advanced state of completion. This is wholly contrary to the date of the Construction Contract.
- (c) In the Appellant's letter to the Revenue dated 28 September 2001, the Appellant explained as follows: 'During the construction period I had to visit the site every day to supervise the construction and to select construction materials for the building. On sale of the premises on that lot, I had to show clients and estate agents the location and the premises. On completion of construction, I had to apply for certificate of completion'. There was no mention at all of the Alleged Tenancy.

42. We have however seen Madam AI as a witness. She is a very plain and simple person. Although there were repeated promptings by the tax representative of the Appellant, our overall impression is that she gave her evidence in a direct and forthright manner. Despite our reservations as outlined in the preceding paragraph, we are disposed to accept the Alleged Tenancy.

43. The Alleged Tenancy is merely one factor to be considered in assessing the Appellant's intention in 1993. That factor has to be weighed in the overall circumstances of this case. The tax representative of the Appellant relied on the 'badges of trade' as outlined in the judgment of Sir Nicolas Browne-Wilkinson (as he then was) in Marson v Morton [1986] 1 WLR 1343. We shall adopt those badges in our analysis of the overall circumstances.

44. Was the transaction a one-off transaction?

(2005-06) VOLUME 20 INLAND REVENUE BOARD OF REVIEW DECISIONS

- (a) The Appellant was no stranger to the property market. He was a partner in a real estate agency between 1989 and 1993. He bought and sold flats in regular intervals. Given the short periods of ownership, it is not convincing to assert that those dealings were in the course of locating a suitable home.
- (b) Lot S cannot be divorced from Lot M. We recognise that the Appellant was not the registered owner of any part of Lot M. We further recognise that practically all the agreements relating to Lot M were signed by Madam A as opposed to the Appellant. Those documents are distinctly similar to the documents relating to Subject Lot. The entitlements of Mr O and Mr N were crystallised at \$180,000 which was the Ding fees payable to Mr U. Madam A did in fact enter into a Ding agreement with Mr O on 2 October 1995. All these are suggestive of the fact that Madam A was the true owner behind one if not both sub-lots in Lot M. The Appellant was engaged as supervisor for the development of the Remaining Portion of Lot M. Units in the completed developments on Lot M were disposed of at a profit. Madam A took a sizeable share of such profits ostensibly as loan repayments. Madam A was also a significant moving force behind the development of the Subject Lot. It is artificial therefore to regard the Subject Lot as a one-off transaction.

45. Is the transaction in question in some way related to the trade which the taxpayer otherwise carries on?

- (a) The Appellant is a carpenter by training.
- (b) Whilst he reported no income in his returns, the Appellant was allegedly paid for supervising construction works on the Remaining Portion of Lot M.

46. The nature of the subject matter:

- (a) The Subject Lot should be viewed in the context of Lot M.
- (b) Madam A and the Appellant were no strangers in turning village plots into profitable redevelopments.

47. The way in which the transaction was carried through: The development of the Subject Lot followed largely the same pattern as that applicable to Lot M.

48. What was the source of finance of the transaction?

(2005-06) VOLUME 20 INLAND REVENUE BOARD OF REVIEW DECISIONS

- (a) We are of the view that this is a significant weakness in the Appellant's case. There is no cogent evidence before us that the Appellant was in a financial position to hold the redevelopment on the Subject Lots on a long term basis.
- (b) According to the returns of the Appellant, he had no income from any profession or occupation. He subsequently submitted to this Board a breakdown of income for the year 1987/88 to 1996/97 asserting that he earned \$300,000 for each of 1993/94 and 1994/95 and \$200,000 for 1996/97. We do not know whether the Supervision Agreement was the basis for this breakdown.
- (c) The Appellant maintained that the proceeds of sale of the Flat I would be used to support the development. This is contrary to the assertion he made in his 1994/95 return. His evidence shed no light on how, apart from the proceeds of sale, he supported his family throughout the relevant years.
- (d) The redevelopment was financed by loans which Madam A borrowed from relatives and friends. Proceeds of sale from the completed development on the Subject Lot were ear-marked to repay those loans. Those loans were repaid from proceeds of sale of the completed units.
- (e) We are not persuaded that the Appellant was in a financial position to redevelop the Subject Lot and then retain the completed development on a long term basis.

49. Was the interest which was purchased resold as it stood or was work done on it relating to it for the purposes of resale?

- (a) The Appellant stressed that he put in considerable amount of work in the redevelopment of the Subject Lot.
- (b) We accept that the Appellant did spend time and energy in the redevelopment. This however is equally consistent with the Appellant embarking upon an adventure in the nature of trade.

50. Was the item purchased resold in one lot as it was brought, or was it broken down into saleable lot?

- (a) The completed village house was divided into three floors. The 1<sup>st</sup> and the 2<sup>nd</sup> Floors were sold on 1 June 1997.
- (b) We do not place much weight on this and the preceding factor.

(2005-06) VOLUME 20 INLAND REVENUE BOARD OF REVIEW DECISIONS

51. What were the purchasers' intentions as to resale as the time of purchase:
- (a) Neither Madam A nor the Appellant gave us a cogent account of their intended use of the development on the Subject Lot. They ended up residing in the Ground Floor of no more than 49.8 m<sup>2</sup> (about 536 square feet). This is much smaller than any of the Flats I, AG and AH. In the absence of any explanation as to how the family was housed in the intervening years and in the completed development, we are not in a position to accept the bare assertions of Madam A and the Appellant.
  - (b) The Appellant maintained that the Alleged Tenancy is a strong pointer that he had an investment intention in 1993. We disagree. Madam AI said she was informed by Madam A that she was in need of fund to support the construction.
  - (c) The Appellant himself said that his circumstances were changing all the time. At one point he planned to occupy all the units in the village house on the Subject Lot. He could not say why he decided to sell. He is totally confused on re-reading the materials.
52. Did the item purchased provide enjoyment to the Appellant?
- (a) The Appellant is now residing in the Ground Floor of the completed redevelopment.
  - (b) We refer to the amendment on the receipt of Estate Company AL. The apparent alteration from 'the whole block' to the 1<sup>st</sup> and 2<sup>nd</sup> Floors casts a shadow over the nature of the Appellant's occupation of the Ground Floor.
53. Taking a global view of all the circumstances of this case, we are not satisfied that the Appellant has discharged his onus of proof. We therefore hold against the Appellant on the issue whether he is liable to profits tax on the disposal of the subject units.

**Construction costs – extent deductible**

54. We refer to paragraph 25 above. The Appellant had unfortunately mixed up some of the payments he made for construction works in Lot M with construction works in Lot S. We have however reviewed the cheque payments made in favour of Mr X in respect of Lot S. Whilst the Appellant had not gathered together all the cheques, we are satisfied by the copy cheques that are available and the notations at the back of the cheques that the Appellant duly paid Mr X \$1,100,000 being the price due under the Construction Contract.

55. There is no credible evidence in relation to other payments to Mr X in respect of Lot S. We therefore allow deduction only to the extent of \$1,100,000.

**Commission for sale – extent deductible**

56. No satisfactory explanation has been given to us on the alleged roles of Estate Company AL and Property Company AM; on the amendments to the receipt of Estate Company AL and on the relationship between the commission allegedly paid and the provisions in the Sale Agreement. We do not accept the account given in the tax representative's letter dated 24 March 2004. It was there suggested that the Appellant was paying Estate Company AL for successfully persuading him to sell.

57. We would therefore only allow commission to the extent as provided in the Sale Agreement, namely, \$35,100.

**Ding fee to Madam L – extent deductible**

58. According to the receipt issued by Madam L dated 13 January 1993, the alleged payment of \$60,000 was by way of cash. On the same day, the Appellant drew cheque 389014 on his Bank AR account for \$250,000 in favour of Madam L said to be payment on behalf of Madam A to acquire a half share in the Remaining Portion of Lot M.

59. As at 13 January 1993, the Appellant had yet acquired any interest in Lot S. There was constant confusion in the evidence before us in relation to expenditure incurred for Lot M and Lot S. We are not satisfied that the sum in question was incurred for the development of the Subject Lot.

**Interest paid – extent deductible**

60. The Appellant admitted in cross examination that the loans were borrowed by Mrs AS from friends and relatives and Mrs AS in turn lent the funds to her.

61. In these circumstances, the conditions for deduction as prescribed by section 16(2) and 17(2)(b) of the IRO are not satisfied and no deduction can be allowed for the interest paid.

62. For these reasons, we dismiss the Appellant's appeal save and in so far as it relates to the issues of construction costs and commission. We remit this case to the Commissioner for assessment of the Appellant on the basis as outlined in this decision.